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February 3, 2006

Centers for Disease Control and Prevention
Division of Global Migration and Quarantine
ATTN: Q Rule Comments
1600 Clifton Road, NE, (E03)
Atlanta, GA, 30333

Re: Docket ID HHS 2005-0045 and HHS-2006-0013; Document ID HHS 2005-0045-0001 and HHS 2006-0013-0001

On behalf of The New England Coalition for Law and Public Health, I am pleased to submit the attached comments on the proposed rulemaking for 42 CFR Parts 70 and 71 concerning Interstate and Foreign Quarantine.

Sincerely,

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THE NEW ENGLAND COALITION FOR LAW AND PUBLIC HEALTH
Comments on the
Interstate and Foreign Quarantine Regulations
Proposed by the Centers for Disease Control and Prevention
Department of Health and Human Services
Control of Communicable Diseases
42 C.F.R. Parts 70 and 71
Proposed Rulemaking, RIN 0920-AA03

The Centers for Disease Control and Prevention (CDC) have proposed new regulations (proposed regulations or proposed rules) to replace those currently governing interstate and foreign quarantine. DHHS, Control of Communicable Diseases; Proposed Rule, 70 FED. REG. 71892 (Nov. 30, 2005). The New England Coalition for Law and Public Health, an association of professors of law and of public health, oppose the new regulations and recommend that they be withdrawn because they are inconsistent with provisions of the United States of the Constitution, exceed the CDC's statutory authority, and fail to offer an effective and practical means for protecting the public health.[1]

1. THE PROPOSED RULES FOR QUARANTINE CONTRAVENE CONSTITUTIONAL LAW PRINCIPLES AND INVITE ABUSE.

The proposed regulations purport to update and clarify existing regulations to "enable CDC to respond more effectively to current and potential communicable disease threats." 70 FED. REG. at 71893. Instead of meeting those goals, the proposed regulations offer confused definitions, constitutionally deficient procedures, and approaches that are likely to be either ineffective or impractical. The analysis below highlights some of the problems with the proposed regulations, focusing on those provisions which pertain to the involuntary detention of individuals, traveling either into the United States or across state borders.[2]

A. The Proposed Rules Violate the Due Process Clause of the Fifth Amendment

Isolation and quarantine have long been used by public health authorities in an attempt to thwart the spread of a communicable disease. Historically, their use has often been either inappropriate and/or ineffective.[3] They are likely to be so here, too,

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[1] These comments are joined by additional individual and organizations listed on page 16.
[2] We also have concerns about the provisions concerning data collection, retention and use, which we believe will be addressed by other commentators.
[3] *See, e.g.*, Howard Markel, WHEN GERMS TRAVEL (2004); John M. Barry, THE GREAT INFLUENZA: THE EPIC STORY OF THE DEADLIEST PLAGUE IN HISTORY (2004); Marilyn Chase, THE BARBARY PLAGUE: THE BLACK DEATH IN VICTORIAN SAN FRANCISCO (2003); World Health Organization, *Severe Acute Respiratory Syndrome (SARS): Status of the Outbreak and Lessons for the Immediate Future* 1 (May 20, 2003), http://www.who.int/csr/media/sars_wha.pdf; Howard Markel, QUARANTINE! EAST EUROPEAN JEWISH IMMIGRANTS AND THE NEW YORK CITY EPIDEMICS OF 1892 (1997); Wendy E. Parmet, *AIDS and*

especially in the event of an influenza epidemic. Nevertheless, there is no doubt that in rare but important circumstances the temporary isolation of an individual who threatens to infect others with a communicable disease may be necessary to stop the spread of the disease.

While courts afford public health officials broad latitude to exercise their authority, including their authority to isolate or quarantine individuals, to protect the public's health, that authority must be exercised in accordance with constitutional limits, including the provisions of the bill of rights protecting the rights of individuals. Importantly, these standards do not simply limit the power of public health authorities such as the CDC; they also protect public health by ensuring that public health actions take place under the rule of law and in a manner that is sustainable in a democratic nation.

The most relevant constitutional provision to the establishment of quarantine or isolation is the Due Process Clause of the Fifth Amendment. It protects all individuals from deprivations of liberty by the federal government without adequate due process of law. Numerous United States Supreme Court decisions have confirmed that forcible detention or incarceration is a deprivation of liberty that cannot be effected without due process of law. Addington v. Texas, 441 U.S. 418 (1979). Moreover, the government cannot detain an individual without a constitutionally-recognized justification. As the Supreme Court made clear in O'Connor v. Donaldson, 422 U.S. 563 (1975), illness alone does not justify detention. Individuals can only be subject to civil commitment due to illness when their behavior also poses a danger to others or possibly to themselves.[4] The determination of whether that is the case must be made on an individualized basis by a judge following a hearing with adequate procedural protections and on the basis of clear and convincing evidence. *See* Foucha v. Louisiana, 504 U.S. 71 (1992); Addington v. Texas, 441 U.S. 418 (1979).

These same principles have been applied by analogy to the civil detention of people with a contagious disease under state law. Best v. St. Vincent's Hosp., 2003 U.S. Dist. Lexis 11354 at *22 (S.D.N.Y. 2003), vacated and remanded on other grounds, Best v. Bellevue Hosp. N.Y. 115 Fed. Appx. 459, 2004 U.S. App. LEXIS 2005 (2d Cir. 2005); Greene v. Edwards, 263 S.E.2d 661 (W.Va. 1980). Detention is generally considered to be prohibited without evidence of the presence of a dangerous contagious disease that can be transmitted to other human beings as well as evidence that the infected person is likely to transmit that disease to other people unless confined. City of Newark v. J.S., 279 N.J.

Quarantine: The Revival of an Archaic Doctrine, 14 HOFSTRA L. REV. 53 (1985); Jew Ho v. Williamson, 103 F. 10 (N.D. Cal. 1900).

[4] Civil commitment of persons with mental illness sometimes raises the question whether the state's *parens patriae* power permits the state to involuntary commit a mentally ill person who is unable to care for himself and is thereby at risk of serious harm to himself, as contrasted with the civil commitment of a mentally ill person who is unable to control his behavior toward others and therefore poses a risk of harm to other people. The Supreme Court has not resolved that question. The so-called danger-to-self category, however, is not relevant to the proposed rules, nor to any involuntary commitment for a contagious disease, because the only cognizable risk is that of spreading a contagious disease to other people.

Super. 178 (1993); City of New York v. Antoinette R., 630 N.Y.S. 2d 1008 (N.Y. Sup. Ct. 1995).

The CDC's legal analysis that accompanied the publication of the proposed regulations (legal analysis) acknowledges that "freedom from physical restraint is a 'liberty' interest protected by the Due Process Clause. . ." 70 FED. REG. at 71895. Oddly, however, it cites as authority for that statement the case of the civil commitment of a convicted child sex molester, Kansas v. Hendricks, 521 U.S. 346 (1997). Moreover, it describes the case as noting that "while freedom from physical restraint is at the core of the liberty protected by the Due Process Clause, that liberty is not absolute." 70 FED. REG. at 71895. *Kansas v. Hendricks* stands not for the meaningless proposition that liberty is not absolute, but for the critical principle that both grounds for civil commitment must be proved in order to justify civil commitment—even in the case of a convicted sex offender who has served his prison sentence. Indeed, in *Hendricks*, the Supreme Court said, "A finding of dangerousness, standing alone, is ordinarily not sufficient ground upon which to justify indefinite involuntary commitment. We have sustained civil commitment statutes when they have coupled proof of dangerousness with the proof of some additional factor, such as 'mental illness' or 'mental abnormality." 521 U.S. at 358. This additional factor is intended to limit commitment to "those who suffer from volitional impairment rendering them dangerous beyond their control." *Id*. The Court again emphasized the necessity of a showing that a person lacks control over dangerous behavior in Kansas v. Crane, 534 U.S. 407, 411 (2002)("there must be proof of serious difficulty in controlling behavior").[5]

These cases and their progeny make clear that, by itself, neither illness nor dangerousness is a constitutionally adequate basis for involuntary detention. Both must be present in ways that create the risk of harm to others.[6] Therefore, no statute or regulation can meet constitutional standards of due process unless it requires evidence of both the presence of a serious contagious disease and the probability that the person will actually infect others if not involuntarily confined.

The proposed regulations do not meet these standards. First, they authorize the Director to issue a quarantine order to any person or group of persons in the "qualifying stage of a quarantinable disease" who is either about to travel to a different state or is a "probable source of infection of persons who will be moving from a State to another State," 70 Fed. Reg. 71933 Sec. 70.16, or in the case of an individual arriving into the

[5] Both *Hendricks* and *Crane* make clear that both factors are required in order to distinguish people who pose a danger because their mental illness makes it difficult for them to control their dangerous behavior "from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings. [citation omitted] That distinction is necessary lest 'civil commitment become a 'mechanism for retribution or general deterrence'—functions properly those of the criminal law, not civil commitment." *Crane*, 534 U.S. at 411. In cases involving mentally ill offenders, a state's choice may be between criminal prosecution and civil commitment. In contrast, having a contagious disease is no crime, and the state has no interest in criminally prosecuting people simply because they are sick.

[6] The dangerousness factor is critically important in cases of contagious disease, because, unlike some mental illnesses, a contagious disease does not affect one's ability to control behavior. People with a contagious disease pose no risk of danger to others unless they are unable to control their behavior.

nation, when the individual is "infected with or exposed to a quarantinable disease…" Id. at 71942 at 71.19. Because the proposed regulations define "qualifying state of a quarantinable disease" to include the "precommunicable stage" of a diseae, 70 FED. REG. 71930 at 70.1, the proposed regulations contemplate the issuance of quarantine orders even when individuals are admittedly incapable of currently transmitting a disease to others. This result makes little sense, especially in the absence of any definition of the term "precommunicable." If the concern is a known disease, like smallpox, existing regulations already permit action and there is no need for new regulations. If the concern is a new disease about which little is known, like a new virulent influenza, then it will impossible to know whether such a flu is likely to cause an emergency; therefore, either officials can do nothing or they take action against everyone with a cold or flu. In contrast, the current Foreign Quarantine regulations allow involuntary isolation only when "the risk of transmission of infection [is considered] to be exceptionally serious." 42 CFR §71.33.

Further, the proposed regulations include no requirement that whatever danger an individual may pose to others cannot be prevented by less restrictive means. *Cf.* Best v. St. Vincent's Hosp., 2003 U.S. DIST. LEXIS 11354 at *23 (S.D.N.Y. 2003), vacated on other grounds, Best v. Bellevue Hosp. N.Y. 115 Fed. Appx. 459, 2004 U.S. App. LEXIS 2005 (2d Cir. 2005)(noting that detention for a communicable disease is constitutional only when there is no less restrictive alternative). Hence, the proposed regulations permit the involuntary detention of individuals when less restrictive or voluntary measures, such as home quarantine (practiced successfully in Ontario during the SARS outbreak) would suffice to alleviate the danger to the public.

The proposed regulations establish federally imposed detention as both the first and last line of defense against contagious diseases. The proposed regulations impose no requirement on CDC or its employees to undertake any actions to reduce the need for involuntary detention. The proposal does not require CDC officials to request that individuals agree to isolate themselves from society for a period of time or to seek medical treatment, even in an isolation room. Nor do the proposed regulations require CDC to help individuals reduce their risk of dangerousness, for example, by ensuring that their medication (as well as food and other necessities) can be delivered to their homes. This rapid resort to the involuntary detention of individuals who are not suspected of committing any crime violates the clear limitations that the Supreme Court has repeatedly placed upon civil commitment. As discussed further below, it may also reduce the efficacy of the proposed regulations.

B. The Quarantine Provisions of the Proposed Regulations Violate the Procedural Due Process Protections of the 5th Amendment

The civil commitment cases have made clear that when the government seeks to civilly commit an individual, significant procedural protections must be provided. At a minimum these include the right to a hearing before an impartial factfinder, Salcido v. Woodbury Cty, 119 F.Supp. 2d 900, 927-928 (N.D. Iowa 2000)(due process demands an impartial factfinder for civil commitment), the right to counsel, cf. Vitek v. Jones, 445

U.S. 480, 494-96 (1980), and the requirement that the government prove its case by clear and convincing evidence, see *infra*. The proposed regulations fall short of meeting each of these criteria.

Although the proposed regulations seek to provide some procedural protections beyond that which is specified under the existing regulations, the proposed regulations cannot pass constitutional muster. First, there is no actual requirement for any hearing to authorize a quarantine order in the absence of a request by the person detained. Thus if an individual does not seek a hearing, none will be provided. Moreover, the hearing is restricted to examining issues of facts—medical evidence of disease; it prohibits consideration of any legal or constitutional challenges.[7] According to the legal analysis,

> "The purpose of the administrative hearing is not to review any legal or constitutional issues that may exist, but rather only to review the factual and scientific evidence concerning the agency's decision, e.g., whether the individual has been exposed to or infected with a quarantinable disease." 70 FED. REG. at 71896.

As a result, under the proposed regulations, individuals may only obtain relief from legal errors by filing a writ of habeas corpus.[8] While the great writ is undoubtedly the final protection for all individuals, it is a perversion of the Constitution and the writ to envision it as the first and only recourse for individuals who are illegally detained. The writ is not a substitute for due process of law. The fact that the writ is available to remedy illegal detentions does not justify a process that will lead to holding people unlawfully in the first place. The availability of a remedy does not magically transform an invalid law or regulation into a valid one.

The procedural protections laid out in the proposed regulations are constitutionally deficient in other ways. For example, although an individual who seeks a hearing is entitled to a "representative," 70 FED. REG. at 71934, the regulations do not state that an individual is entitled to the appointment of counsel in those cases in which the individual cannot afford private representation. Hence under the regulations an individual may be subject to a quarantine order that lasts in the case of some diseases for a considerable period of time without the benefit of any counsel to contest the basis for the detention. Moreover, the regulations do not require that hearing officers will be independent, much less a judge, nor must they necessarily have any expertise in the matter at hand; they need only be a CDC employee other than the one who initiated the quarantine. 70 FED. REG. 71905. Finally, the proposed regulations do not satisfy the constitutional demand that the state prove its case by clear and convincing evidence. Instead, the legal analysis accompanying the regulations assumes without foundation that

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[7] Proposed 42 C.F.R. §§ 70.20(b) [and 71.23(b)] provide: "Requests for a hearing by a [the] person or group of persons under quarantine shall be limited to genuine and substantial issues of fact in dispute."

[8] The legal analysis appears to rely on this possibility as offering the only due process available in the proposed rules: "Under 28 U.S.C. § 2241, an opportunity for judicial review of the agency's decision exists via the filing of a petition for a writ of habeas corpus. This judicial review mechanism affords individuals under quarantine with the full panoply of due process rights typical of a court hearing."

the standards of proof might be eased somewhat in an epidemic situation. There is no basis in law for an "epidemic exception" to the demands of due process, especially when the question to be determined is whether there is a risk of harm at all.

C. The Proposed Provisional Quarantine Provisions Violate Due Process Requirements

One of the most notable inventions of the proposed regulations is the institution of a puzzling new procedure called "provisional quarantine," which is actually just involuntary detention—without probable cause or a warrant or a hearing—for up to 3 business days. Proposed 42 C.F.R. §§70.15 and 71.18. The purpose of such detention appears to be to allow the CDC time to figure out whether there is probable cause or even reasonable suspicion that a person actually has a contagious disease that will be transmitted to others and could therefore justifiably be subjected to quarantine under the statute or Constitution. Thus, the provisional quarantine provisions appear to be simply a way to avoid meeting any constitutional standards whatsoever prior to involuntarily detaining people.

This conclusion is supported by the text of the legal explanation which states:

> "A provisional quarantine order is likely to be premised on the need to investigate based on reasonable suspicion [9] of exposure or infection, whereas a quarantine order is more likely to be premised on a medical determination that the individual actually has one of the quarantinable diseases. Thus, during this initial three business day period, there may be very little for a hearing officer to review in terms of factual and scientific evidence of exposure or infection. Three business days may be necessary to collect medical samples, transport such samples to laboratories, and conduct diagnostic testing, all of which would help inform the Director's determination that the individual is infected with a quarantinable disease and that further quarantine is necessary. In addition, because provisional quarantine may last no more than three business days, allowing for a full hearing, with witnesses, almost guarantees that no decision on the provisional quarantine will actually be reached until after the provisional period has ended, thus making such a hearing virtually meaningless in terms of granting release from the provisional quarantine."
> 70 Fed. Reg. at 71896.

CDC's arguments for failing to provide any oversight for up to *3 business days* is unconvincing and constitutionally troubling. Proposed 42 C.F.R. §§70.15(c) and 71.16(c). When there is a weekend or holiday, the provisional quarantine provisions could permit unreviewable detention for up to 6 days. The use of business days is itself puzzling in this context, since it suggests that the CDC does not work on weekends or holidays, even during a threatened epidemic. If a disease is so dangerous that it is

[9] Although the legal explanation uses the term "reasonable suspicion, the proposed regulations themselves use the term "reasonable belief."

arguably necessary to detain someone without evidence that he has the disease, why would public health officials and laboratories be unavailable to work over the weekend? Certainly if the nation were at risk from the importation of a deadly epidemic, it would be imperative for CDC to work over the weekend to determine the nature of the threat we face. After all, if one person arrives in the country with such a disease, the possibility exists that others not in quarantine have also been exposed. Indeed, the idea that CDC would not be acting with all due speed to determine if someone had entered with the country with a quarantinable disease defies imagination.

This provisional quarantine is also inconsistent with the requirements for detention set forth in the Public Health Service Act. There is no basis under the Act for authorizing what amounts to an involuntary detention before deciding whether to order an involuntary detention. Indeed, while the courts have recognized that a brief period of detention may be permissible in the case of civil commitment and criminal process prior to the initiation of any judicial process, even individuals suspected of heinous felonies must be brought before a judge within 48 hours unless the government can show a bona fide emergency. County of Riverside v. McGlaughlin, 500 U.S. 44 (1991). Certainly there is no reason to continue a so-called provisional detention over the weekend.

The provisional quarantine provisions are particularly troubling because they will undoubtedly be applied, not by the Director of the CDC, but by field officers who may or may not have medical training in the diagnosis of the relevant communicable diseases. The legal analysis makes clear that this initial decision for provisional quarantine will be made in the absence of information that would be sufficient to support a reasonable suspicion that a person is infected and likely to infect others. Instead, individuals may be subject to provisional quarantine, without the possibility of any procedural protections, if the field officer has a "reasonable belief" that a person is "in the qualifying stage of a quarantinable disease." Proposed 42 C.F.R. §§70.14(a) and 71.17(a). As noted above, these definitions themselves are so broad as to encompass individuals who pose no threat to anyone. Moreover, the proposed rules do not clarify what the basis for a reasonable belief would be in such a case. [10] Of particular concern is the possibility that a zealous official will usher people with asthma or a common cold into involuntary detention in order to appear to protect the public health. Anyone who is returning from a country that has had cases of yellow fever or SARS might be subjected to provisional quarantine, without any right to a hearing or review, merely on the word of a lower level CDC officer or employee.

[10] The proposed rules define an "ill person" to include anyone who has a temperature of 100.4 degrees for more than 48 hours, or diarrhea, or persistent cough accompanied by respiratory distress, or "displays other symptoms or factors that are suggestive of communicable disease." Proposed. 42 C.F.R. §§70.1(b) and 71.1(b). Such symptoms are not limited to serious contagious diseases that are likely to presage an epidemic, but are present with many benign conditions and illnesses, such as asthma and the common cold. Furthermore, the proposed rules do not require a finding or even reasonable belief that a person be an ill person to justify detention.

D. The Proposed Rules Do Not Respect Individuals' Reasonable Expectations of Privacy

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. Ordinarily this demands that a warrant issue before a search is conducted, even when the state seeks to protect the public's health. Camara v. Municipal Court, 387 U.S. 523 (1967). There is no question but that involuntary detention constitutes a seizure and an involuntary medical examination constitutes a search. Ferguson v. City of Charleston, 532 U.S. 67 (2001); Rochin v. California, 342 US 165 (1952). Because the proposed rules authorize searches and seizures without a warrant or probable cause, they should demonstrate that such searches and seizures are reasonable.[11] This they fail to do.

The legal analysis uses strained and inapt analogies to support its conclusion that constitutional protections are not necessary in the case of civil detentions for contagious diseases. It conflates the circumstances in which noncitizens can be detained for purposes of verifying immigration status or inspecting goods subject to customs laws with the more limited circumstances in which citizens can be involuntarily isolated in order to prevent the spread of disease. Most remarkably, it compares detaining anyone who might have symptoms of a disease with detaining drug smugglers at the border. [12] No one disputes that the U.S. Immigration & Customs Enforcement or the Customs and Border Patrol, for example, is authorized to refuse entry to noncitizens who are ineligible for admission to the United States, or even possibly to involuntarily detain people who are reasonably suspected of a criminal offense or terrorism. That authority does not justify treating anyone, including U.S. citizens, who may or may not be sick like potential criminals or terrorists.

Furthermore, the authority to police U.S. borders cannot apply in the case of individuals who are already lawfully within the country, but are merely traveling across state lines. Yet, the proposed regulations permit medical screenings, detentions, and

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[11] The Supreme Court has found that medical searches can be undertaken without a warrant in some special, limited circumstances. *E.g.*, Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989). Importantly, in these cases, the Court has found that the individuals searched have chosen to engage in some activity which has limited their expectation of privacy. This is not the case when individuals are searched merely because they may appear ill.

[12] The legal analysis quotes a comment in dictum in the majority opinion in United States v. Montoya de Hernandez, 473 U.S. 531 (1985), that "the detention of a suspected alimentary canal smuggler at the border is analogous to the detention of a suspected tuberculosis carrier at the border; both are detained until their bodily processes dispel the suspicion that they will introduce a harmful agent into this country." This analogy appears unfounded in law and fact. The opinion cited no case upholding the detention of a suspected tuberculosis carrier. There is no bodily process that will dispel suspicion that one is a tuberculosis carrier. The diagnosis of tuberculosis requires a medical examination and laboratory analysis. Finally, a tuberculosis "carrier" does not have a contagious form of the disease, is no threat to other people and would not be subject to detention or other involuntary action. Justices of the Supreme Court have cited the *Montoya* case primarily as a case dealing with policing U.S. borders. *See, e.g.*, City of Indianapolis v. Edmond, 531 U.S. 32, 38 (2000)(citing Montoya as describing [U.S. v.] *Martinez-Fuerte* [428 U.S. 543 (1976)] as one of a number of Fourth Amendment cases that "reflect longstanding concern for the protection of the integrity of the border.").

presumably medical examinations of individuals who are not at the border but are merely traveling interstate. 70 FED. REG. 71932. In light of this apparent confusion over the relevant constitutional and statutory requirements, one may reasonably question whether the proposed rules are based on an accurate understanding of CDC's authority and the rights of the individuals protected by the Constitution.[13]

The proposed regulations appear to assume that CDC officers will always act in good faith to protect the public health. While we generally share that assumption, the Supreme Court reminds us that laws cannot rest on the good faith of officials. In the context of criminal law enforcement, the Court recognized that warrants are generally required because the determination of when an individual's protected right of privacy must yield should ordinarily be determined not by well-meaning officers but by impartial judicial officers:

> The point of the Fourth Amendment, which is often not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate. . . . When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.
> Johnson v. United States, 333 U.S. 10, 13-14 (1948).

Although courts are rightly apt to give pubic health officials latitude to protect the public's health, today, when judges and magistrates are as near as a cell phone, there is no reason why an application for a warrant for quarantine and medical examinations could not be heard expeditiously without jeopardizing the public's health.

2. THE PROPOSED RULES EXCEED THE SCOPE OF STATUTORY AUTHORITY

The proposed rules rely on section 361(b) of the Public Health Service Act, 42 U.S.C. §264(b) as authority for the new rules provisions governing quarantine, set forth in the footnote below.[14] However, the rules purport to permit involuntary quarantine of persons in circumstances not authorized by that statute.

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[13] Wherever case law has not fully defined the outer limits of government's authority to conduct warrantless searches, the legal analysis appears to adopt the interpretation that least protects individual privacy. This is puzzling, especially because the government is not in any adversarial posture with respect to individuals who might be identified as possibly sick. One would expect that the CDC would attempt to help such people instead of stripping them of their rights.

[14] 42 U.S.C. §264 provides:

(b) Apprehension, detention, or conditional release of individuals. Regulations prescribed under this section shall not provide for the apprehension, detention, or conditional release of individuals except for the purpose of preventing the introduction, transmission, or spread of such communicable diseases as may be specified from time to time in Executive orders of the President upon the recommendation of the Secretary, in consultation with the Surgeon General.

Subsection (d) of section 361 limits the apprehension and detention of individuals to persons who are "reasonably believed" to have both of the following 2 characteristics:

(1) infection with a communicable disease, and
(2) a probable source of infection to other people because they are, either:
(A) moving or about to move from a State to another State, or
(B) a probable source of infection to other people individuals who, while infected, will be moving from a State to another State.

The statute provides only one set of rules for detaining individuals, regardless of whether that detention is called quarantine or provisional quarantine. The statute limits detention to individuals who are both infected with a communicable disease and also likely to infect others, whether deliberately or involuntarily.[15] Contrary to that statutory prescription, however, the proposed rules purport to authorize detention without meeting both criteria.

The proposed rules for Foreign Quarantine purport to authorize both "provisional" and regular quarantine without satisfying the second criterion; they include no reference whatsoever that detention must be limited to people who are likely to infect others. [16]

(c) Application of regulations to persons entering from foreign countries. Except as provided in subsection (d), regulations prescribed under this section, insofar as they provide for the apprehension, detention, examination, or conditional release of individuals, shall be applicable only to individuals coming into a State or possession from a foreign country or a possession.
(d) Apprehension and examination of persons reasonably believed to be infected.
(1) Regulations prescribed under this section may provide for the apprehension and examination of any individual reasonably believed to be infected with a communicable disease in a qualifying stage and (A) to be moving or about to move from a State to another State; or (B) to be a probable source of infection to individuals who, while infected with such disease in a qualifying stage, will be moving from a State to another State. Such regulations may provide that if upon examination any such individual is found to be infected, he may be detained for such time and in such manner as may be reasonably necessary. For purposes of this subsection, the term "State" includes, in addition to the several States, on the District of Columbia.
(2) For purposes of this subsection, the term "qualifying stage", with respect to a communicable disease, means that such disease--
(A) is in a communicable stage; or
(B) is in a precommunicable stage, if the disease would be likely to cause a public health emergency if transmitted to other individuals.
(e) Preemption. Nothing in this section or section 363 [42 USCS § 266], or the regulations promulgated under such sections, may be construed as superseding any provision under State law (including regulations and including provisions established by political subdivisions of States), except to the extent that such a provision conflicts with an exercise of Federal authority under this section or section 363 [42 USCS § 266].

[15] These two criteria are consistent with constitutional requirements of due process of law described above. The proposed rules for Interstate Quarantine authorize the Director to issue a quarantine order whenever she reasonably believes that a person meets the two statutory criteria. Proposed 42 C.F.R. §70.16(a)(1).

[16] The explanation of the proposed rules concedes this point, noting that the second criterion will only be applied in cases of interstate quarantine. 70 FED. REG. at 71904. This means that a determination of the risk posed by a person would be made if a person were traveling between states in the United States, but not when a person arrives in the United States from a foreign country.

Proposed 42 C.F.R. §§71.17 and 71.19. This is inconsistent with section 361 of the Public Health Service Act, as well as constitutional standards for involuntary detention. The same proposed rules also sidestep the first criterion in section 361, which requires a reasonable belief that a person is "infected" with a communicable disease. The proposed Foreign Quarantine rules for both provisional and regular quarantine purport to authorize the involuntary detention of persons who are believed to have been "exposed" to a contagious disease, as well as those believed to be infected. This inconsistent with the governing statute and beyond the agency's authority to promulgate.

In addition, the proposed rules contain a provision that negates the application of both necessary criteria for valid detention. The proposed rules for both Interstate and Foreign Quarantine purport to authorize the Director to involuntarily detain individuals whenever a person refuses an examination or, even more remarkably, whenever the Director decides that an examination is not reasonably available or is medically contraindicated. Proposed 42 C.F.R. §70.16(d), and §71.19(d). This provision creates an exception that would allow involuntary detention of persons for whom there is no evidence of either disease or risk of transmitting disease.

Since it is only possible to determine whether a person is infected with a relevant disease by medical examination, the provision authorizing quarantine in the absence of an examination is particularly troubling. In the initial subsection authorizing "regular" quarantine, the proposed rules specify that the Director's belief (that a person is infected) must be based on "clinical manifestations, diagnostic tests or other medical tests, epidemiological information, laboratory tests, physical examination, or other evidence of exposure or infection." Proposed 42 C.F.R. §70.16(a)(1), and §71.19(a). This list of possible types of evidence of infection reinforces the idea that the Director's decision to quarantine must be based on objective proof, although some of the listed forms of evidence, such as epidemiological information and the catch-all phrase of "other evidence" may not satisfy the requirement for individualized evidence. Where the proposed rules authorize the Director to quarantine any person who refuses examination or whenever the Director determines that an examination is not reasonably available, the requirement for evidence evaporates entirely.

3. THE PROPOSED RULES WILL BE INEFFECTIVE IN THAT THEY RELY ON ILLUSORY QUARANTINE "STATIONS" AND FAIL TO UTILIZE EFFECTIVE VOLUNTARY MEASURES TO PROTECT THE PUBLIC FROM COMMUNICABLE DISEASES

The proposed regulations presuppose that "[s]topping an outbreak—whether it is naturally occurring or intentionally caused—requires the use of the most rapid and effective public health tools available," 70 RED. REG. at 71892, and that quarantine is among the tools. What the regulations fail to consider are the practical limitations of undue reliance on involuntary quarantine as well as the opportunities missed by the regulations' failure to include less coercive, voluntary measures as prerequisites to the imposition of detention.

The CDC recognizes that there are significant practical, resource-based limitations to the utility of quarantine. The CDC has advocated an increase in the number of so-called quarantine "stations" in the United States. However, even if the number were increased, they do not offer a feasible means of preventing contagious disease in the United States. As the Institute of Medicine recently reported, "Unlike their namesakes, today's quarantine stations are not stations per se, but rather small groups of individuals located at major US airports." INSTITUTE OF MEDICINE, Committee on Measures to Enhance the Effectiveness of the CDC Quarantine Station Expansion Plan for U.S. Ports of Entry. QUARANTINE STATIONS AT PORTS OF ENTRY PROTECTING THE PUBLIC'S HEALTH 1 (Sivitz, LB, Stratton K, & Benjamin, GC, eds., 2005). The IOM describes these stations as follows:

> "Unlike physical areas that travelers pass through, the term 'station' in this report refers to a group of 1 to 8 individuals located at an airport, land crossing, or seaport who perform activities designed to help mitigate the risk that a microbial and other threat of public health significance may enter the United States or affect travelers in this country. As noted above, all of the established stations (as of May 2005) are located at airports. Although the staff have offices and one or more patient isolation rooms, most interactions between quarantine station staff and travelers or crew take place in public areas of the terminals." Id. at 14.

As of May 2005, there were a total of 8 "stations" in the country.[17] By the month of November, the number rapidly increased to 18, according to the CDC's website.[18] The proposed rules would authorize the CDC to establish hospitals and stations. However, it is impossible to believe that the CDC would be able to create a presence at every one of the 474 points of international travel into the United States. The current 18 "stations" cover only 3.8% of U.S. ports of entry. At best, the CDC hopes to ultimately have 25 stations, which would represent 5% of all ports of entry.[19]

One wonders how such a "station" could respond to the arrival of passengers with contagious disease, especially in the event of a pandemic. International airports have many terminals. Where would the station be located? If it were placed in the terminal with the most international flights, would it still be accessible to arrivals from domestic and other flights? Transporting passengers to from one terminal to the station is no

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[17] The Institute of Medicine recently found that "The...CDC have quarantine stations at 8 of the US's 474 ports of entry. . . . ." INSTITUTE OF MEDICINE, Committee on Measures to Enhance the Effectiveness of the CDC Quarantine Station Expansion Plan for U.S. Ports of Entry. QUARANTINE STATIONS AT PORTS OF ENTRY PROTECTING THE PUBLIC'S HEALTH 1 (Sivitz, LB, Stratton K, & Benjamin, GC, eds., 2005).

[18] Those 18 are located in Anchorage, Atlanta, Boston, Chicago, Detroit, El Paso, Honolulu, Houston, Los Angeles, Miami, Minneapolis, Newark, New York, San Diego, San Francisco, San Juan, Seattle, and Washington DC. CDC, National Center for Infectious Diseases, Division of Global Migration and Quarantine (formerly the Division of Quarantine), Quarantine Stations, http://www.cdc.gov/ncidod/dq/quarantine_stations.htm.

[19] Given the negligible number of stations, the explanation of the proposed rules contains what appears to be an implausible assertion, "CDC quarantine officers are typically the first line of defense in preventing the importation of communicable diseases into the United States. Quarantine officers routinely conduct rapid assessments of ill passengers at airports and other ports of entry to assess the presence of disease." 70 FED. REG. at 71895.

different from transporting passengers to a clinic or hospital outside the airport. Existing hospitals are better equipped to care for the handful of people with contagious diseases that could lawfully be subjected to involuntary hospital detention. In the event of a serious epidemic that overwhelms the capacity of hospitals, the addition of a few isolation beds at selected airports is not likely to make a significant difference in controlling a pandemic or caring for patients. It would be both costly and redundant to create a fully equipped contagious disease hospital at all ports of entry.[20] Resources would be better used to secure physicians, nurses, vaccines, medicines and other supplies. At best, a small clinic at key ports like New York City, Washington, D.C., and Los Angeles should serve the needs of new arrivals who are too ill to be transported to the nearest hospital.

Furthermore, while the regulations ostensibly permit the imposition of quarantine for interstate travel, they offer no explanation of how this could be accomplished. Does the CDC intend to create border crossings between states? Will it build quarantine stations to hold people at the George Washington Bridge? At toll booths or rest stops along the highway?[21]

The necessity, in the case of an "outbreak" for relying upon other sites for care and even isolation points to a final, compelling deficit with the new regulations: they completely overlook the importance of using voluntary measures to reduce the spread of an epidemic. Especially because the CDC lacks and probably will always lack adequate resources to find, examine, and hold all individuals who may be contagious during an epidemic, protection of the public's health will demand that the public trust the government and voluntarily agree to follow public health recommendations. The proposed regulations, however, miss an important opportunity to gain the public's trust and prevent serious illness by failing to require the CDC to offer medical care at government expense to those who are detained. When the federal government incarcerates a person who is ill, it is incumbent on the government to offer appropriate medical care, especially when the basis for detention is that very illness. Without guaranteeing such care, not only does the government forsake its moral and constitutional obligation, it also gives individuals a serious health reason to resist quarantine.[22]

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[20] Funding available for improving security may be limited and subject to controversy, despite a recognized need for improvement. See, e.g., Jon D. Haveman, Howard J. Shatz, & Ernesto A. Vilchis, *U.S. Port Security Policy after 9/11: Overview and Evaluation", 2(4) J. Homeland Security and Emergency Management*: Article 1 (2005), http://www.bepress.com/jhsem/vol2/iss4/1 (review of port security measures finding need for improvement and funding).

[21] Similarly, the proposed regulations' provisions demanding travel permits, 70 FED. REG. 71931, are absurdly unrealistic. Do we expect all Americans who think they might be "coming down with the flu" now to contact the CDC for permission to commute from their home in one state to their work in another state across the border? If everyone contacted the CDC, what would the agency do?

[22] Robert J. Blendon, Catherine M. DesRoches, Martin S. Cetron, John M. Benson, Theodore Meinhardt, & William Pollard, *Attitudes Toward the Use of Quarantine in a Public Health Emergency in Four Countries,* 25 HEALTH AFFAIRS w15 (Jan. 24, 2006), http://content.healthaffairs.org/cgi/content/full/hlthaff.25.w15/DC1.

Unfortunately, by promulgating regulations that rely on coercive measures, by failing to require that the agency undertake those measures only when there is no less restrictive alternative, and by authorizing detention so broadly that mistakes are apt to be made, the proposed regulations may well undermine the public's trust and confidence in both the CDC and public health authorities more generally. Should a true public health emergency arise, the result may be dire.

CONCLUSION

In light of the many ways in which the proposed regulations are inconsistent with constitutional requirements and statutory limitations, subject to arbitrary and prejudicial application, and detrimental to protection of the nation from an infectious epidemic, they should be withdrawn. It is preferable to retain the current regulations, which must be applied in a manner consistent with the Constitution whether or not they contain explicit statements of constitutional standards, than to replace them with unwise new rules that explicitly depart from constitutional standards and fail to offer positive ways to protect public health.

Respectfully submitted,

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The New England Coalition for Law and Public Health is an association of professors of law and public health who teach in universities in New England. Formed in 2000 to foster excellence in scholarship and pedagogy in the field of law and public health, the New England Coalition holds workshops and promotes research on legal issues relevant to public health. Members are:

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